

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

MILTON O. CRAWFORD,
Plaintiff,
vs.

SMITH'S FOOD AND DRUG STORE, INC.,)
et al.,)
)
Defendants.)

Case No.: 2:12-cv-00122-GMN-GWF

ORDER

Pending before the Court is the Report and Recommendation of United States Magistrate Judge George W. Foley, Jr. (ECF No. 15.) *Pro se* Plaintiff Milton O. Crawford filed Objections (ECF Nos. 18, 22). For the reasons discussed below, the Court will accept in full Judge Foley's Report and Recommendation to the extent that it is not inconsistent with this Order.

I. BACKGROUND

Plaintiff filed his original Complaint along with an Application for Leave to Proceed *in forma pauperis* (ECF No. 1). Judge Foley granted Plaintiff's Application (Order, February 3, 2012, ECF No. 3) and dismissed Plaintiff's claims for discrimination, hostile work environment, and intentional infliction of emotional distress, without prejudice with leave to amend (Order, March 8, 2012, ECF No. 9).

Plaintiff's Amended Complaint appears to allege claims for intentional infliction of emotional and mental distress, undue harassment, racial discrimination, age discrimination, sexual discrimination, wage discrimination, defamation, degradation of character, humiliation, laceration of feelings, retaliation for engaging in protected activity, wrongful retaliatory discharge and compensatory damages. (Am. Compl., ECF No. 16.)

The Amended Complaint was referred to Judge Foley pursuant to 28 U.S.C. § 636(b)(1)(B)

1 and District of Nevada Local Rule IB 1-4. Judge Foley recommended that this Court enter an
2 order dismissing Plaintiff's claims for wage, gender and age discrimination and intentional
3 infliction of emotional distress, for failure to state a claim upon which relief can be granted.
4 (R&R, ECF No. 15; Min. Order, May 21, 2012, ECF No. 20.)

5 Plaintiff objects solely to Judge Foley's recommendation to dismiss the claims for wage
6 discrimination and for intentional infliction of emotional distress. (ECF Nos. 18, 22.)

7 **II. LEGAL STANDARD**

8 A party may file specific written objections to the findings and recommendations of a
9 United States Magistrate Judge made pursuant to Local Rule IB 1-4. 28 U.S.C. § 636(b)(1)(B);
10 D. Nev. R. IB 3-2. Upon the filing of such objections, the Court must make a de novo
11 determination of those portions of the Report to which objections are made. *Id.* The Court may
12 accept, reject, or modify, in whole or in part, the findings or recommendations made by the
13 Magistrate Judge. 28 U.S.C. § 636(b)(1); D. Nev. IB 3-2(b).

14 Federal Rule of Civil Procedure 12(b)(6) mandates that a court dismiss a cause of action
15 that fails to state a claim upon which relief can be granted. *See North Star Int'l. v. Arizona Corp.*
16 *Comm'n.*, 720 F.2d 578, 581 (9th Cir. 1983). Dismissal is appropriate only when the complaint
17 does not give the defendant fair notice of a legally cognizable claim and the grounds on which it
18 rests. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). In considering whether the
19 complaint is sufficient to state a claim, the Court will take all material allegations as true and
20 construe them in the light most favorable to the plaintiff. *See NL Indus., Inc. v. Kaplan*, 792 F.2d
21 896, 898 (9th Cir. 1986).

22 The Court, however, is not required to accept as true allegations that are merely
23 conclusory, unwarranted deductions of fact, or unreasonable inferences. *See Sprewell v. Golden*
24 *State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). A formulaic recitation of a cause of action
25 with conclusory allegations is not sufficient; a plaintiff must plead facts showing that a violation

1 is *plausible*, not just possible. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Twombly*,
2 550 U.S. at 555) (emphasis added).

3 Mindful of the fact that the Supreme Court has “instructed the federal courts to liberally
4 construe the ‘inartful pleading’ of pro se litigants,” *Eldridge v. Block*, 832 F.2d 1132, 1137 (9th
5 Cir. 1987), the Court will view Plaintiff’s pleadings with the appropriate degree of leniency.

6 “Generally, a district court may not consider any material beyond the pleadings in ruling
7 on a Rule 12(b)(6) motion However, material which is properly submitted as part of the
8 complaint may be considered on a motion to dismiss. *Hal Roach Studios, Inc. v. Richard Feiner*
9 *& Co.*, 896 F.2d 1542, 1555 n.19 (9th Cir. 1990) (citations omitted).

10 If the court grants a motion to dismiss, it must then decide whether to grant leave to
11 amend. The court should “freely give” leave to amend when there is no “undue delay, bad
12 faith[,] dilatory motive on the part of the movant . . . undue prejudice to the opposing party by
13 virtue of . . . the amendment, [or] futility of the amendment” Fed. R. Civ. P. 15(a); *Foman*
14 *v. Davis*, 371 U.S. 178, 182 (1962). Generally, leave to amend is only denied when it is clear
15 that the deficiencies of the complaint cannot be cured by amendment. *See DeSoto v. Yellow*
16 *Freight Sys., Inc.*, 957 F.2d 655, 658 (9th Cir. 1992).

17 **III. DISCUSSION**

18 **A. Wage Discrimination**

19 In order to prove a prima facie case of discrimination in violation of Title VII, Plaintiff
20 must establish: (a) he belonged to a protected class; (b) he was qualified for his job; (c) he was
21 subjected to an adverse employment action; and (d) similarly situated employees not in his
22 protected class received more favorable treatment. *Moran v. Selig*, 447 F.3d 748, 753 (9th Cir.
23 2006) (citing *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 818 (9th Cir. 2002)).

24 To establish a prima facie case of wage discrimination an individual must provide
25 sufficient evidence that an employer paid different salaries to men and women for equal work

1 performed under similar conditions. *Piva v. Xerox Corp.*, 654 F.2d 591, 598 (9th Cir. 1981).
2 Equal pay for equal work is what the Equal Pay Act requires, and those elements are the focus
3 of the prima facie case. *See Drum v. Leeson Elec. Corp.*, 565 F.3d 1071, 1072 (8th Cir. 2009).
4 Therefore, in order for Plaintiff to sufficiently state a claim for wage discrimination, he must
5 allege that Defendant paid different salaries based on gender.

6 Here, Plaintiff offers the starting wages of four different employees who he alleges
7 started at a higher rate than he did. However, of those four employees, two are male and two are
8 female. Plaintiff has therefore failed to show that the Defendant paid different salaries based on
9 gender, and this deficiency does not appear to be curable by amendment, particularly since
10 Plaintiff has already been given leave to amend once before. Accordingly, Plaintiff's claim for
11 wage discrimination will be dismissed with prejudice.

12 **B. Intentional Infliction of Emotional Distress**

13 To state a claim for intentional infliction of emotional distress a plaintiff must establish:
14 "(1) extreme and outrageous conduct with either the intention of, or reckless disregard for,
15 causing emotional distress, (2) the plaintiff's having suffered severe or extreme emotional
16 distress, and (3) actual or proximate causation." *Dillard Dep't Stores, Inc. v. Beckwith*, 115 Nev.
17 372, 989 P.2d 882, 886 (1999) (quoting *Star v. Rabello*, 97 Nev. 124, 625 P.2d 90, 92 (1981)).
18 "[E]xtreme and outrageous conduct is that which is outside all possible bounds of decency and
19 is regarded as utterly intolerable in a civilized community." *Maduik v. Agency Rent-A-Car*, 114
20 Nev. 1, 953 P.2d 24, 26 (1998) (internal quotation marks and citation omitted). "The Court
21 determines whether the defendant's conduct may be regarded as extreme and outrageous so as to
22 permit recovery, but, where reasonable people may differ, the jury determines whether the
23 conduct was extreme and outrageous enough to result in liability." *Chehade Refai v. Lazaro*, 614
24 F.Supp.2d 1103, 1121 (D. Nev. 2009) (citing *Norman v. Gen. Motors Corp.*, 628 F.Supp. 702,
25 704–05 (D. Nev. 1986)).

1 Here, the Court finds that Plaintiff failed to plead facts sufficient to support a claim of
2 intentional infliction of emotional distress. Even if the Court were to consider Plaintiff's alleged
3 wrongful termination as extreme or outrageous conduct, Plaintiff failed to allege that he suffered
4 any severe or emotional distress as a result of that conduct.

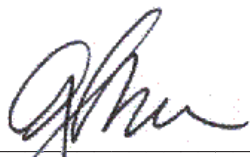
5 Even if Plaintiff were to properly allege each element of this claim, the Court finds that
6 amendment of this claim would be futile, particularly since Plaintiff has already been given
7 leave to amend once before. In the facts alleged by Plaintiff thus far there is no indication that
8 Plaintiff can plead additional facts that might support a plausible claim that Defendant
9 committed extreme and outrageous conduct that is outside all possible bounds of decency and is
10 regarded as utterly intolerable in a civilized community. For this reason, Plaintiff's claim for
11 intentional infliction of emotional distress will be dismissed with prejudice.

12 **IV. CONCLUSION**

13 **IT IS HEREBY ORDERED** that Judge Foley's Report and Recommendation (ECF No.
14 15) be **ACCEPTED**, in full, to the extent that it is not inconsistent with this Order.

15 **IT IS FURTHER ORDERED** that Plaintiff's claims for wage, gender and age
16 discrimination and intentional infliction of emotional distress shall be **DISMISSED with**
17 **prejudice** for failure to state a claim upon which relief can be granted.

18 **DATED** this 25th day of June, 2012.

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21 
22 Gloria M. Navarro
23 United States District Judge
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